MITCHELL ENERGY CORP.
TEXAS GAS EXPLORATION CORP.

IBLA 81-452 Decided November 12, 1982

Appeals from decisions of Colorado State Office, Bureau of Land Management, denying protests of designations of portions of inventory unit as a wilderness study area. CO-070-009.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   In assessing the presence or absence of wilderness characteristics in an inventory unit, the Bureau of Land Management necessarily makes subjective judgments which are entitled to considerable deference when challenged on appeal and such judgments may not be overcome by expressions of simple disagreement.

APPEARANCES: Andrew E. Reed, Austin, Texas, for appellant Mitchell Energy Corporation; D. J. Kelly, Esq., Houston, Texas, for appellant Texas Gas Exploration Corporation; Dale D. Goble, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Mitchell Energy Corporation (Mitchell Energy) and the Texas Gas Exploration Corporation (Texas Gas) have appealed from separate decisions of the Colorado State Office, Bureau of Land Management (BLM), dated February 2, 1981, denying their protests of the designation of portions of inventory unit CO-070-009 (Demaree Canyon) as a wilderness study area (WSA).

On November 14, 1980, the BLM State Office published its final intensive wilderness inventory decision in the Federal Register, in part designating 21,050 acres in unit CO-070-009 (Demaree Canyon) as a WSA. By letter dated December 13, 1980, appellant Mitchell Energy protested designation of the unit as a WSA, contending that "potential" oil and gas exploration and development within the unit, as a result of existing leases covering a "substantial portion" of the unit, precludes designation as a WSA. In the alternative, appellant argued that a "significant imprint," namely, "a road

and well site" located in secs. 2 and 26, T. 7 S., R. 103 W., sixth principal meridian, Colorado, should be excluded from the WSA. In addition, appellant stated that the southern portion of the unit, including the area at the base of the cliffs and extending north to the "6,500 foot contour," should be excluded because the area offers no outstanding opportunities for solitude or a primitive and unconfined type of recreation. Appellant noted that the area is characterized by "sparse vegetation and flat topography" and that the cliffs are inaccessible.

In its February 2, 1981, decision, BLM responded to appellant's protest. The BLM State Director characterized the "road," identified by appellant, as a "way" and concluded that, along with the well site, they were not considered to be

> a significant impact on naturalness. Although the way was initially constructed, it has not been maintained and is revegetating naturally. This vegetation has greatly reduced the visibility of these imprints. I am aware there are a few cut banks with little revegetation occurring on them but they too will revegetate but over a longer time period.

Furthermore, the southern boundary of the unit had been located along "the edge of unnaturalness," in accordance with Departmental guidelines. Finally, BLM stated that conflicts with oil and gas development will be addressed in the study phase of the wilderness review process.

It appears from appellant's statement of reasons for appeal that appellant now focuses on the elimination of the southern area of the unit from the WSA. Appellant specifically requests that we "delete that portion of the WSA which does not contain wilderness characteristics and delineate the boundary following generally the 6500 foot contour" (Statement of Reasons at 19). In particular, the area lacks outstanding opportunities for solitude or a primitive and unconfined type of recreation and is not needed as a "buffer area." Id. at 18. Appellant argues that the area lacks opportunities for solitude due to the "flat topography, sparse vegetation, and prominence of oil and gas activities, agriculture, and motorized recreational uses in the area." Id. at 16. Rather, appellant argues, the top of the cliffs should serve as the boundary because it denotes a significant change in topography, thereby physically dividing "wilderness and non-wilderness lands." Id. at 18. Furthermore, appellant reiterates its contention that the road and well site should also be excluded. The road "has been and is being used for the passage of vehicles and contains road cuts which were created and maintained by mechanical means." Id. at 13. Appellant argues that BLM has provided no evidence that the imprints will revegetate naturally and that they are similar to those imprints which were deleted from the WSA.

By letter dated December 15, 1980, appellant Texas Gas protested designation of certain areas in the southwestern and western portions of the unit as a WSA, contending that oil and gas activity, in the form of wells, pipelines, and roads along the western boundary of the unit and within the unit, adversely affects the naturalness and opportunities for solitude of those portions of the unit. Appellant stated that the situation had not changed through the use of cherrystemming and that these impacts are similar to those which were deleted from the WSA in the southern and eastern portions

of the unit. Appellant maintains that the southwestern boundary should be located at the "5,600 foot contour."

In its February 2, 1981, decision, BLM responded to appellant's protest. BLM stated that the southwestern boundary was located "along the edge of an actual physical impact," so as to exclude "significant impacts." In accordance with Departmental guidelines, the boundary was not located "around the 'zone of influence' of an imprint." Finally, BLM stated that the impact of outside sights and sounds of oil and gas activity would be addressed during the study phase of the wilderness review process.

On appeal, appellant reiterates the arguments made in its protest. Appellant states that the impact of oil and gas activity along the western boundary of the unit is substantially noticeable because of the flat topography and/or sparse vegetation and the fact that the unit "closes in around these activities on three sides" (Statement of Reasons at 4). In addition, the southwestern and western portions of the unit "do not afford natural protection in terms of foliage or topography to mitigate the sights, sounds, or effect of the oil and gas activity." Id. Finally, appellant argues that BLM has deprived it of the "right to exploit" its oil and gas leases within the unit, in violation of Rocky Mountain Oil and Gas Association v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), appeal docketed, No. 81-1040 (10th Cir. Jan. 5, 1981).

[1] The BLM decision designating part of the Demaree Canyon inventory unit as a WSA was made pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1976), which provides, in relevant part, that: "[T]he Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 [16 U.S.C. § 1131 (1976)]. "From time to time thereafter, the Secretary is required to report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. Congress will make the final decision with respect to designating wilderness areas, after a recommendation by the President. 43 U.S.C. § 1782(b) (1976).

The wilderness review undertaken by the State Office pursuant to section 603(a) of FLPMA has been divided into three phases by BLM: Inventory, study, and reporting. The BLM decision marks the end of the inventory phase of the review process and the beginning of the study phase.

The key wilderness characteristics described in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976), which are assessed during the wilderness review process are size, naturalness, and either an outstanding opportunity for solitude or for a primitive and unconfined type of recreation. See Bureau of Land Management, U.S. Department of the Interior, Wilderness Inventory Handbook (Sept. 27, 1978) at 6 (hereinafter cited as WIH).

The first argument that we must deal with is appellant Mitchell Energy's contention that unit CO-070-009 is not "roadless," as required by section 603(a) of FLPMA, supra. Appellant identifies a "road," located within the

unit. BLM refers to it as a "way." For purposes of the wilderness inventory, BLM has adopted the definition of a "road" suggested by the legislative history of FLPMA at H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976): "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." See WIH at 5. Appellant has presented only a photograph showing two tracks and vehicles to support its contention that a "road" is located within the WSA. In its Intensive Inventory Report, dated June and July 1980 at page 5, BLM specifically stated: "The access road has been determined to be a way because although it was initially constructed, it is no longer being maintained. Several major washouts make the route impassable. This way is over 3 miles long but has revegetated to a high degree." The absence of evidence of maintenance by mechanical means supports BLM's conclusion that the route is a "way." We, therefore, agree with that conclusion. C & K Petroleum Co., 59 IBLA 301 (1981).

Appellant Mitchell Energy also argues that the "road" and an associated well site should be excluded on the basis that they are a "significant" impact on naturalness.

The criterion of naturalness is satisfied where the imprint of man's work is "substantially unnoticeable," as set forth in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976). The Act does not require that the hand of man be completely unnoticeable.

It is apparent from the record that BLM gave adequate consideration to the road and well site, in light of these guideliness. In the Intensive Inventory Report at page 5, BLM stated:

> This way is over 3 miles long but has revegetated to a high degree. * * * Several steep cut banks on drier southern exposures have not revegetated but these sites are scattered and have limited visibility. The mine site has been overgrown with vegetation reducing the mine's impact to a minimum on the surrounding hillsides.

Appellant has not presented any evidence, beyond mere assertions, that the "road" and well site should be considered "substantially noticeable." Expressions of disagreement with BLM's assessment are not sufficient to establish error in BLM's decision. Koch Industries, Inc., 62 IBLA 45 (1982).

Both appellants contend that portions of unit CO-070-009, along the boundary, lack either naturalness or outstanding opportunities for solitude because they are adversely affected by outside sights and sounds. We have dealt with this question on a number of occasions. Consideration of "outside sights and sounds," generally, is properly deferred until the study phase of wilderness review, in accordance with Organic Act Directive (OAD) 78-61, Change 3, at page 4:

> Assessing the effects of the imprints of man which occur outside a unit is generally a factor to be considered during study. Imprints of man outside the unit may be considered during inventory only in situations where the imprint is adjacent to the

> unit and its impact is so extremely imposing that it cannot be ignored, and if not used, reasonable application of inventory guidelines would be questioned. Imprints of man outside the unit, such as roads, highways, and agricultural activity, are not necessarily significant enough to cause their consideration in the inventory of a unit. However, even major impacts adjacent to a unit will not automatically disqualify a unit or portion of a unit. [Emphasis in original.]

Where BLM has applied the policy of the OAD, we have concurred therein. See, e.g., Walter R. Benoit, 62 IBLA 99 (1982). It is apparent from the record that BLM did apply that policy. In its Final Intensive Inventory Decision at page 333, BLM specifically concluded that outside sights and sounds are not so extremely imposing that they cannot be ignored because the "diverse topography screens outside influences." In the absence of any evidence that the outside sights and sounds are "so extremely imposing," we must concur in BLM's assessment.

Both appellants seek to readjust the boundaries of the WSA on the basis that certain areas lack oustanding opportunities for solitude or a primitive and unconfined type of recreation. Generally speaking, a boundary should, according to OAD 78-61, Change 2 at page 5, be located "on the physical edge of the imprint of man" (emphasis added), rather than being located on the basis of the "zone of influence" around an imprint. Moreover, a boundary "should not be further constricted on the basis of opportunity for solitude or primitive and unconfined recreation" (OAD 78-61, Change 3 at 3 (emphasis in original)). As the OAD further explains: "A unit is not to be disqualified on the basis that an outstanding opportunity exists only in a portion of the unit. Each individual acre of land does not have to meet the outstanding opportunity criterion. Obviously, there must be an outstanding opportunity somewhere in the unit." Id. (emphasis in original). Accordingly, it was not improper for BLM to refuse to readjust the boundaries of the WSA on the basis that certain areas do not satisfy the outstanding opportunity criterion. It is sufficient that outstanding opportunities are available somewhere in unit CO-070-009. 1/

Finally, appellant Texas Gas argues that designation of unit CO-070-009 as a WSA deprives it of the "right to exploit" its oil and gas leases within the unit. Section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), provides that the Secretary shall manage lands under wilderness review

> in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in

1/ Appellant Texas Gas has suggested that certain oil and gas activity within the unit adversely affects naturalness and opportunities for solitude. The record, however, indicates that BLM attempted to exclude all evidence of oil and gas activity and other major imprints of man from the WSA, deleting some 8,840 acres of land prior to the final intensive inventory decision. See Intensive Inventory Report at pages 2-5. The remaining imprints were considered to be minor in nature. Appellant has offered no evidence to the contrary.

> the manner and degree in which the same was being conducted on the date of approval of this Act * * *. [Emphasis added.]

This management authority is subject to valid existing rights. FLPMA, section 701(h), 43 U.S.C. § 1701 note (1976).

The Department has taken the position that "the holder of an oil and gas lease * * * issued prior to the enactment of FLPMA may develop the leasehold * * * to the extent authorized by the issuance * * * document." Solicitor's Opinion, M-36910 (Supp.), 88 I.D. 909, 913 (1981). Development may take place even where it impairs the suitability of an area for preservation as wilderness. Id. at 913. 2/ However, in accordance with section 603(c) of FLPMA, supra, the Secretary may, nevertheless, regulate development "to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." See Dale F. Gimblett, 60 IBLA 341 (1981).

In the present case, there is no evidence that BLM has sought to prevent appellant from engaging in oil and gas exploration or development under its leases. The mere designation of a unit as a WSA does not, thereby, preclude oil and gas exploration and development. 3/

In the absence of a showing of compelling reasons for modification or reversal, the BLM decisions denying appellants' protests must be affirmed. City of Colorado Springs, 61 IBLA 124 (1982).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Douglas E. Henriques
Administrative Judge.

2/ This is consistent with the court's mandate regarding pre-FLPMA leases in Rocky Mountain Oil and Gas Association v. Andrus, supra.

3/ Furthermore, the potential for oil and gas exploration and development in the WSA will properly be addressed during the study phase of the wilderness review process. See Union Oil Co. (On Reconsideration), 58 IBLA 166, 170 (1981).